

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY ARTHUR BUSH,
Petitioner,
v.
CHERYL K PLILER,
Respondent.

Case No.: 01CV142 BEN (NLS)

ORDER:

**(1) DENYING RULE 60(b) MOTION
FOR RELIEF FROM JUDGMENT,
and**

**(2) DECLINING TO ISSUE A
CERTIFICATE OF
APPEALABILITY**

[Docket No. 103, 105, 107]

On March 3, 2009, this Court¹ entered judgment denying Petitioner Anthony Arthur Bush's Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254. (Docket Nos. 90-91.) Petitioner brought a challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986) based on the prosecutor exercising a preemptory challenge to excuse the sole remaining African American in the jury pool. Petitioner appealed, and on February 16,

¹ The Court notes this case was previously assigned to the Honorable Napoleon A. Jones. It was assigned to the undersigned upon Petitioner's filing of the present motions.

2011, the Ninth Circuit Court of Appeals affirmed this Court’s judgment. *Bush v. Pliler*, 413 Fed. Appx. 996 (9th Cir. February 16, 2011). On January 19, 2016, Petitioner filed the instant Motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6). (Docket No. 103.)

Petitioner seeks relief from judgment based on a change in the law — the Ninth Circuit’s recent decision in *Shirley v. Yates*, 807 F.3d 1090 (9th Cir. 2015). Petitioner argues that had his Petition been considered under *Shirley*, he would have prevailed. The Court denies Petitioner’s Rule 60(b) Motion because it is an unauthorized second or successive habeas petition over which this Court lacks jurisdiction.

DISCUSSION

“Rule 60(b)(6), the provision under which [Petitioner] brought his motion, permits reopening for ‘any . . . reason that justifies relief’ other than the more specific reasons set out in Rule 60(b)(1)-(5).”² *Jones v. Ryan*, 733 F.3d 825, 833 (9th Cir. 2013) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005)). Relief under Rule 60(b)(6) is only available when the petitioner shows “‘extraordinary circumstances’ justifying the

² There does not appear to be any basis for relief from judgment under any other provision of Rule 60(b) either. Rule 60(b) allows a court to relieve a party from a judgment for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

1 reopening of a final judgment.” *Id.* (quoting *Gonzalez*, 545 U.S. at 535).

2 Before considering the substance of the Motion, this Court must first determine
3 whether Petitioner’s Rule 60(b) motion is in effect a second or successive habeas petition.
4 *Gonzalez*, 545 U.S. at 530-32. Second or successive habeas petitions are generally
5 prohibited “unless the petitioner meets certain narrow requirements.” *Jones*, 733 F.3d at
6 834 (citing 28 U.S.C. § 2244(b)). To avoid this high standard, “petitioners at times have
7 characterized their second or successive habeas corpus petitions as Rule 60(b) motions.”
8 *Id.* Allowing a petitioner to do so would “impermissibly circumvent the requirement that
9 a successive habeas petition be precertified by the court of appeals as falling within an
10 exception to the successive-petition bar.” *Gonzalez*, 545 U.S. at 532 (citing §
11 2244(b)(3)).

12 “[A] motion that does not attack ‘the integrity of the proceedings, but in effect asks
13 for a second chance to have the merits determined favorably’ raises a claim that takes it
14 outside the bounds of Rule 60(b) and within the scope of [the Antiterrorism and Effective
15 Death Penalty Act of 1996’s] limitations on second or successive habeas corpus
16 petitions.” *Jones*, 733 F.3d at 834 (citing *Gonzalez*, 545 U.S. at 532 n.5). A motion
17 contending “that a subsequent change in substantive law is a ‘reason justifying relief,’
18 from the previous denial of a claim, . . . although labeled a Rule 60(b) motion, is in
19 substance a successive habeas petition and should be treated accordingly.” *Gonzalez*, 545
20 U.S. at 531 (identifying the types of “claims” that might be presented in a Rule 60(b)
21 motion, but would be subject to § 2244(b)). “[A] Rule 60(b) motion based on a purported
22 change in the substantive law governing the claim could be used to circumvent
23 § 2244(b)(2)(A)’s dictate that the only new law on which a successive petition may rely
24 is ‘a new rule of constitutional law, made retroactive to cases on collateral review by the
25 Supreme Court, that was previously unavailable.’” *Id.* at 532.

26 Petitioner’s reliance on *Phelps v. Alameida* is misplaced. Although the case
27 addressed the availability of relief under Rule 60(b) when there had been changes in the

1 law or unsettled law became settled, the changes were on a non-merits issue —
 2 timeliness. *Phelps*, 569 F.3d at 1127-1129. As the Supreme Court has explained, a
 3 petitioner is not making a habeas claim “when he merely asserts that a previous ruling
 4 which *precluded a merits determination* was in error — for example, a denial for such
 5 reasons as failure to exhaust, procedural default, or statute-of-limitations bar.” *Gonzalez*,
 6 545 U.S. at 532 n.4 (emphasis added). When, as here, this Court and the Ninth Circuit
 7 have substantively resolved the merits of the Petition, Rule 60(b) relief is not available.
 8 *Id.* at 532 (finding a Rule 60(b) motion constitutes a second or successive habeas petition
 9 when it “attacks the federal court’s previous resolution of a claim *on the merits*.”).


10 Because Petitioner’s Rule 60(b) motion is the equivalent of a second or successive
 11 petition, this Court lacks jurisdiction to consider the motion absent a certificate from the
 12 Ninth Circuit authorizing the filing of the petition. 28 U.S.C. § 2244(b)(3)(A); *see also*
 13 *Rishor v. Ferguson*, – F.3d –, 2016 WL 2610176, at *5 (“A petitioner’s failure to seek
 14 such authorization from the appropriate appellate court before filing a second or
 15 successive habeas petition acts as a jurisdictional bar.”).

16 CONCLUSION

17 Petitioner’s Rule 60(b) motion for relief from judgment is **DENIED** for the
 18 reasons set forth above. The denial is without prejudice to Petitioner filing a second or
 19 successive petition in this Court *if he obtains permission from the Ninth Circuit Court of*
 20 *Appeals*. The Court DENIES a certificate of appealability with respect to the denial of
 21 Petitioner’s Rule 60(b) Motion. Petitioner’s motions for appointment of counsel and for
 22 leave to proceed IFP are DENIED as moot.

23 IT IS SO ORDERED.

24 Dated: June 22, 2016

25 
 26 Hon. Roger T. Benitez
 27 United States District Judge